

CCASE:
MSHA V. DOUG CONNELLY SAND & GRAVEL
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FMSHRC-WDC
MARCH 20, 1987

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. WEST 86-196-M

DOUG CONNELLY SAND & GRAVEL

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

ORDER

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default on February 11, 1987, finding Doug Connelly Sand & Gravel ("Connelly") in default for failure to respond to a show cause order. The judge assessed civil penalties totalling \$2,179. For the reasons that follow, we vacate the default order and remand the case for further proceedings.

On March 3, 1987, Connelly's attorney wrote a letter to Judge Merlin seeking vacation of the default order on the ground that he mistakenly had filed Connelly's answer to the Secretary's penalty proposal with counsel for the Secretary instead of with the Commission. In support of this assertion, copies of Connelly's Answer, Affirmative Defense and Counterclaim were attached to the letter, together with copies of a mailing receipt for certified mail dated August 7 1986, and a signed receipt for delivery dated August 8, 1986. Connelly's letter was received by the Commission on March 6, 1987.

The judge's jurisdiction over the case terminated when his decision was issued. 29 C.F.R. § 2700.65(c). We will treat Connelly's letter requesting relief from the judge's order as a timely petition for discretionary review because it was received within 30 days of the judge's decision. 29 C.F.R. § 2700.70(a). The petition is granted.

The record discloses that on May 1 and 2, 1986, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued nine citations to Connelly alleging violations of various safety

~386

regulations. Upon preliminary notification by MSHA of the civil penalties proposed for these alleged violations, Connelly's owner filed a "Blue Card" request for a hearing before this independent Commission. On July 24, 1986, counsel for the Secretary served him with the Secretary's penalty proposal. As noted, Connelly's attorney served an answer on the Secretary by certified mail return receipt requested on August 7, 1986. However, the document was never filed with the Commission. Under the Commission's rules of procedure, the party against whom a penalty is sought must file an answer with the Commission within 30 days after service of the penalty proposal. 29 C.F.R. § 2700.5(b) & 28.

Not having entered an appearance, Connelly's attorney never appeared on the distribution list for relevant Commission documents. The return receipt for the judge's show cause order indicates that it was delivered to someone named "Connelly." While Connelly failed to respond to the judge's show cause order, we recognize that Connelly's attorney did prepare an answer and serve it on the Secretary in a timely manner. In light of this fact and counsel's promptness in bringing the existence of a possible excuse to the attention of the Commission, we believe that the operator should have the opportunity to present its position to the judge.

For the foregoing reasons, the judge's default order is vacated and the matter is remanded to the judge, who shall determine whether relief is appropriate. See, e.g., Kelley Trucking Co., 8 FMSHRC 1867, 1869 (December 1986).

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

~387

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